

FEDERAL BUREAU OF INVESTIGATION
FOI/PA
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FOI/PA# 1441064-000

Total Deleted Page(s) = 45

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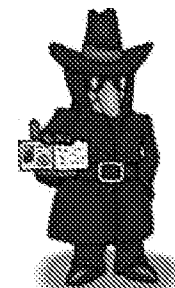
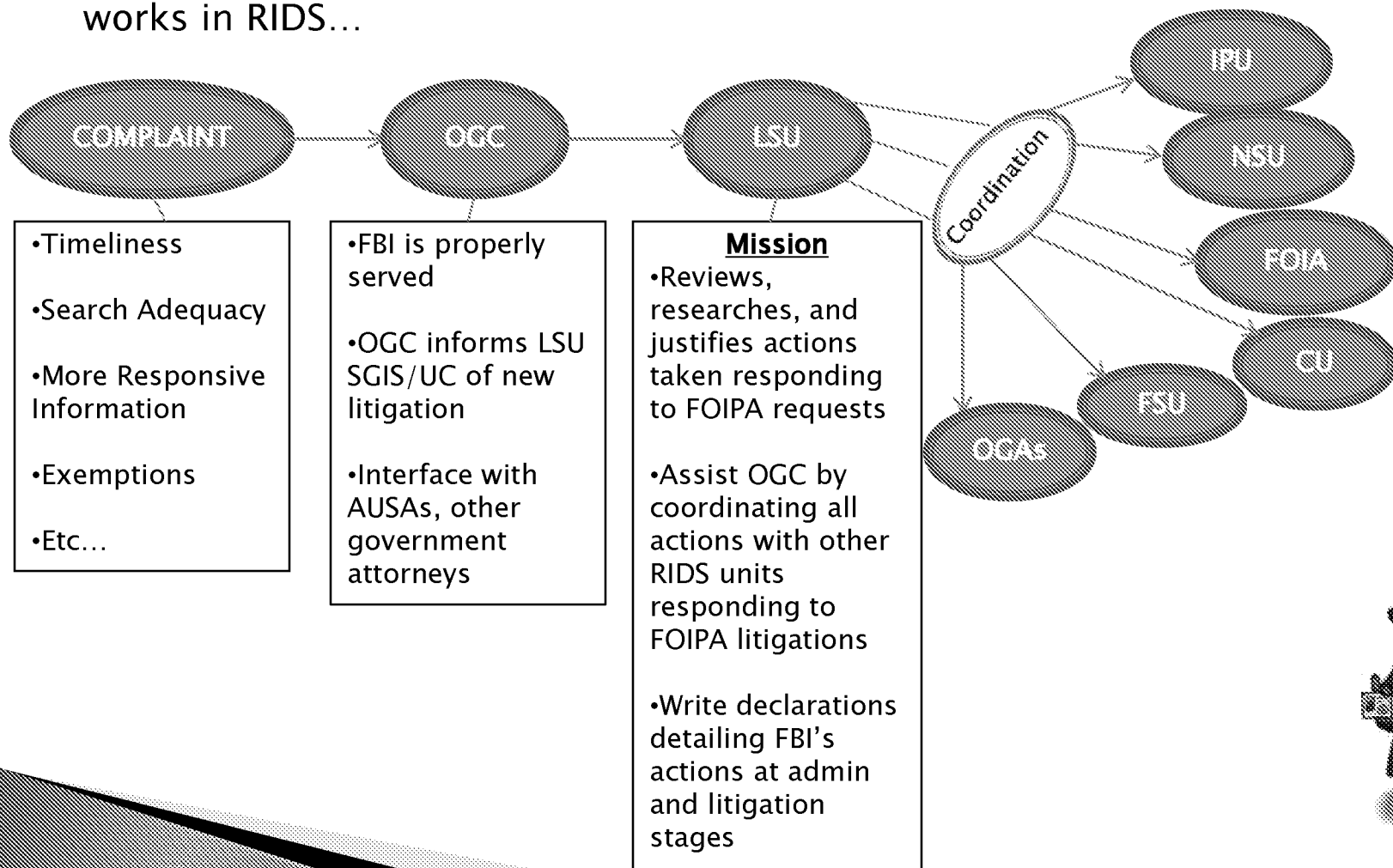
Crassus Cutis
Frigus Sanguis



Litigation Support Unit (LSU) Overview

LSU in Real Terms

- A plaintiff may litigate for any variety of reasons. This is how the process works in RIDS...



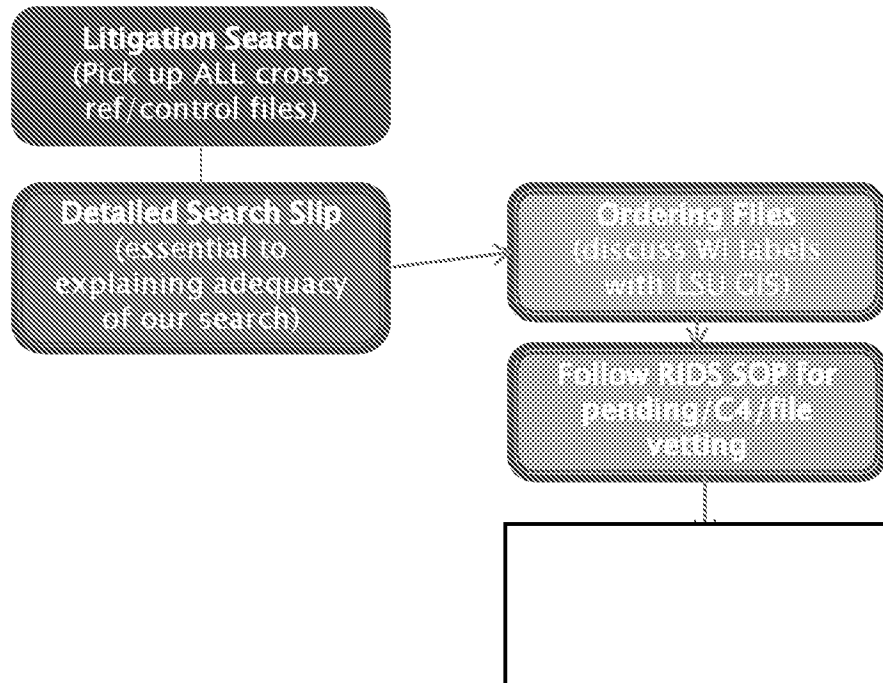
Why is it important to get it right?

- De novo review - At the litigation stage, this is the last opportunity for the FBI to correct any issues that may have been overlooked at the admin stage (e.g. search, processing, response). If we do not correct the issue in the litigation we have waived the opportunity.
- It is essential that the FBI is factual in its responses. If something was overlooked at the admin stage with a different outcome in the litigation stage, we must address and explain it at this stage.
- LSU is readily available if you have questions or concerns. PLEASE do not hesitate to contact us!



RIDS Units – Team Effort...

Initial Processing Unit (IPU)



All Correspondence must be approved by LSU/FLU before mailing

* date the FBI conducted the initial search for records at the admin stage

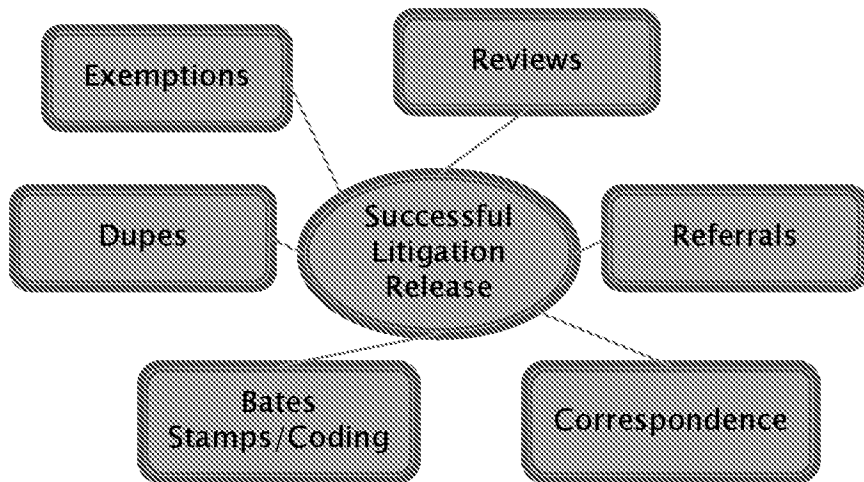
QUESTIONS YOU MAY WANT TO ASK YOUR LSU POC

- What is the Search Cutoff date* for the case?
- What is the scope of the litigation? *i.e.* what part(s) of the request(s) are at issue for the case
- Litigation Action Plan – provides background, litigation strategy and advises of the various steps IPU/FOIA GIS need to take **(should be provided by LSU POC, typically at a “kick-off” meeting)**
- LSU is readily available if you have questions or concerns. **PLEASE** do not hesitate to contact us!

b7E



FOIA



➤ **LSU Kick-off Meeting:** LSU GIS meets with FOIA/CU to discuss details of the new litigation case and provide Action Plan outlining strategy and expectations of all players

➤ **Dupes:** Must identify (on the page) what page the removed one is duplicate to. **Must be an exact match, to include any and all markings; otherwise it will need to be processed.**

➤ **Exemptions:** Stack all applicable exemptions. Do not lump exemptions together on the page.

➤ **Referrals:** Discuss with LSU POC on how to handle (typically, as consultation). On the letter, list the specific location of referred material.

➤ **Bates Stamps:** See LSU POC for the Bates Stamps Setup.

➤ **Coding:** Coded categories detail the nature of information withheld pursuant to the provisions of the FOIA

➤ **Reviews:** Litigations require review by LSU and 100% review by at least one of the following: FOIA Expert, TC, UC

➤ If b7A case, check for bifurcation...

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FOIA – Coding

- Discuss with LSU POC if coding is needed for your case and, if so, how to use the coding chart (**see LSU POC for Coding Chart**)

Coding Tips

- When coding, make sure to add a hyphen “-” in front of the first code in the text field beside the exemption (*See Fig. 1*)
- If citing multiple codes for the same exemption, use a comma to separate (*See Fig. 1*)
- b6/b7C: Make sure to add the same applicable codes for both (*See Fig. 1*)
- If an OGA with attribution claims an exemption, list the OGA name beside each applicable exemption in the group (*See Fig. 2*)

Fig. 1

Fig. 2

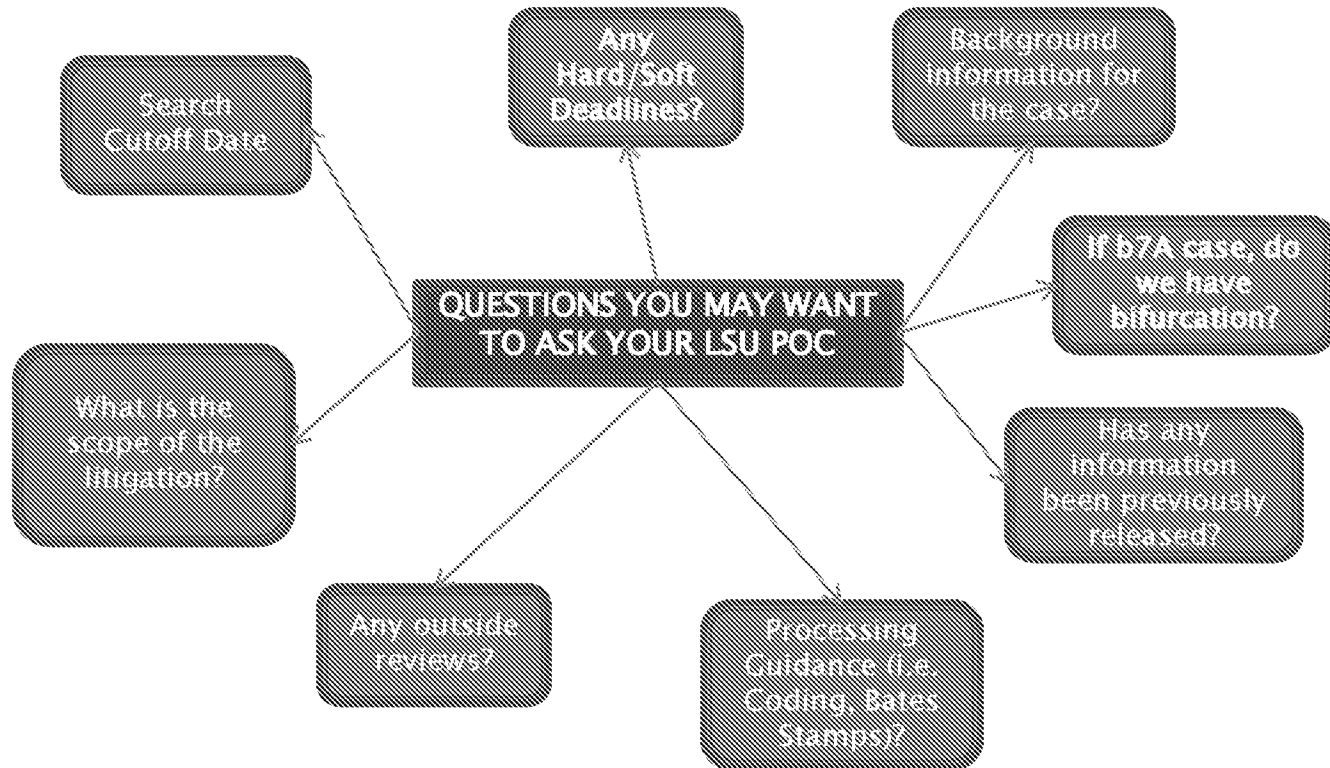
Fig. 3

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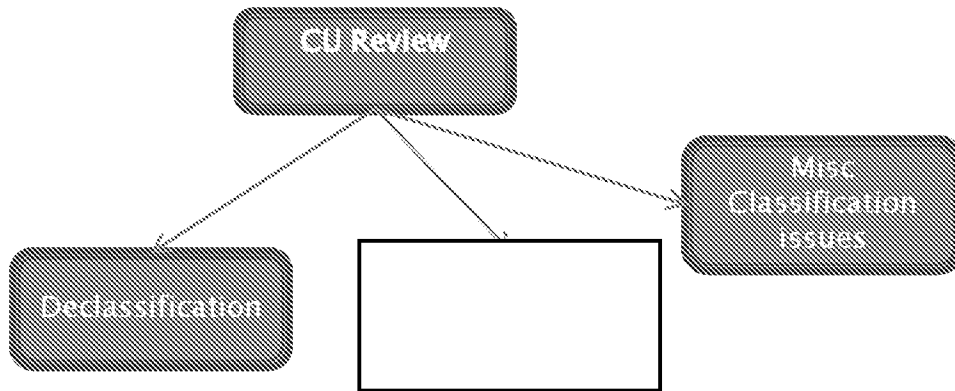


FOIA Continued...

- LSU is readily available if you have questions or concerns. Most of the concerns below should be on the Action Plan; however, PLEASE do not hesitate to contact us!



CU



➤ CU review for litigations goes through CU-2 (**see LSU GIS if you encounter classification issues**)

➤ CU Reviews usually expedited for litigations

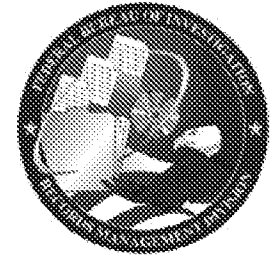
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Questions ?



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LSU – How to Build a Winning Declaration

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ATTORNEY WORK PRODUCT
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Learning Objectives

- ▶ Understanding Declarations
 - Purpose of Declarations
 - Who can be the Declarant
 - Types of Declarations
 - Framing of Declarations
 - Drafting of Declarations
 - Review process
- ▶ Purpose for the Declaration Checklist
- ▶ Purpose for Coding and when necessary
- ▶ Preparing Exhibits for Declarations

Declaration / Declarant

- ▶ Declaration – a formal, written statement resembling an affidavit; not notarized, however, Declarant attests under penalty of perjury
- ▶ Declarant – one who makes a statement in accordance with the rules of evidence; the statement in a FOIPA case is offered to provide a factual basis for the agency's action and justify withholdings

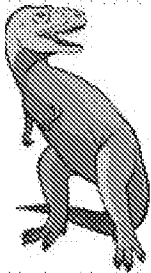
Phase I – Case Startup

- ▶ Plan to have draft declaration prepared several weeks in advance of deadline. This allows for LSU review, FLU review and AUSA review.
- ▶ Focus on initial tasks
 - Paper trail – pull all correspondence and send to FLU; if there are any gaps (e.g., OIP response letter), request information
 - Assist FLU with Answer, if requested

Coding

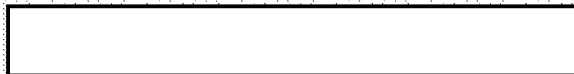
- ▶ DC Protocol on Coding / Coded *Vaughn* – see Justification of Categories Chart. This chart is to be used as an example of possible coded categories. Please modify to fit your case needs.

FOIA EXEMPTION 5

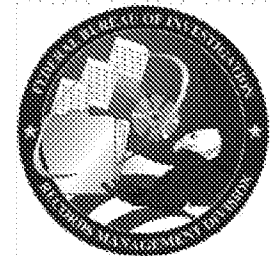
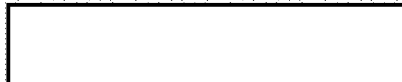


Litigation Support Unit (LSU)

UC



SGIS



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Agenda

- Elements of Exemption 5
- What is a Privilege?
- Identifying Privileged Information
- Deliberative Process Privilege
- Common Deliberative Process Scenarios
- Attorney Work Product Privilege
- Attorney-Client Privilege
- Exemption 5 Discretionary Releases
- Practical Exercise—email string

ELEMENTS OF EXEMPTION 5

Under 5 U.S.C. § 552(b)(5) –

*“inter-agency or intra-agency memorandums
or letters which would not be available
by law to a party other than an agency in litigation with the
agency”*

- are exempt from disclosure.

ELEMENTS OF EXEMPTION 5

Two Threshold Elements:

- (1) Inter-agency or intra-agency records.
- (2) Not available by law to a party in litigation.

ELEMENTS OF EXEMPTION 5

Intra-agency = records exchanged:

- Within the FBI
- Between the FBI and Contractors
- Between the FBI and Consultants

ELEMENTS OF EXEMPTION 5

Inter-agency = records exchanged between the FBI and other Executive Branch agencies

- Records exchanged between the FBI and Congress, a court, or a state/local/foreign law enforcement agency do not satisfy the threshold

ELEMENTS OF EXEMPTION 5

Not available by law to a party in litigation with the agency

- *Translation:* the information would be withheld under a privilege in civil discovery proceedings with the agency.
- *Application to FOIA:* Exemption 5 enables protection of the same privileged information in civil litigation when its subject to a FOIA request.

WHAT IS A PRIVILEGE?

What is a Privilege?

- A peculiar right, advantage, exemption, power, franchise, or immunity held by a person or class, not generally possessed by others (*See Black's Law Dictionary*).
- Privilege likens to a “zone of protection.”

Most Common Privileges under Exemption 5:

- Deliberative Process Privilege
- Attorney Work Product Privilege
- Attorney-Client Privilege

IDENTIFYING PRIVILEGED INFORMATION

- ◆ Is the document marked as privileged?
 - ◆ Privilege markings do not *automatically* make information exempt under Exemption 5, they only indicate the author believed information is privileged.
 - ◆ Labels cut both ways—the absence of markings says nothing about whether information is exempt under Exemption 5.
- ◆ ****Per FOIA Improvement Act of 2016 – Harm Analysis for ALL exemptions****
 - ◆ Prior to July 2016, harm analysis was done pursuant to the President Obama FOIA Memo and Attorney General Holder's FOIA Guidelines of March 26, 2009.
 - ◆ As of July 2016, the harm analysis was incorporated in the language of the statute and is now required for **ALL** FOIA exemptions including Exemption 5. (*See* FOIA Improvement Act of 2016, S.337, Public Law 115-185)

DELIBERATIVE PROCESS PRIVILEGE

- Purpose:
 - Prevent injury to the quality of agency decisions.
 - Encourage open, frank discussions on matters of policy between subordinates and superiors
 - Protect against premature disclosure of proposed policies before they are adopted.
 - Protect against public confusion caused by the disclosure of reasons for agency action that were not ultimately adopted.

DELIBERATIVE PROCESS PRIVILEGE

- Two Requirements:
 - (1) Information must be **predecisional**
 - (2) Information must be **deliberative**

DELIBERATIVE PROCESS PRIVILEGE

- Predecisional = information was created before the agency's final decision
- Deliberative = information that was part of a decision-making process
 - Recommendations, analysis, evaluations
 - Candid opinions on legal or policy matters
 - Advice between agency's subordinates and superiors

DELIBERATIVE PROCESS PRIVILEGE

- Map it out for analysis and ask:
 - What is the decision-making process?
 - Who are the players and what are their roles?
 - What decision is being made?
 - Who is the final decision-maker?
 - When was the decision made and what documents it?

DELIBERATIVE PROCESS PRIVILEGE

- Deliberative--Look for words or phrases like:
 - “In the opinion of” or “In my opinion”
 - “I recommend” or “I advise”
 - “Plan to” or “Anticipate”
 - “Potential options include”

DELIBERATIVE PROCESS PRIVILEGE

- Drafts
 - Can generally be protected b5 as the drafting process is inherently a “deliberative” process.
 - Beware labels: Stamping “Draft” on a document does not automatically protect it, exercise diligence as necessary.

DELIBERATIVE PROCESS PRIVILEGE

- The privilege does not protect:
 - Final decisions—the decision is not deliberative.
 - Statements of policy followed by the agency.
 - Documents post-dating final decisions or policies.
 - Facts that can be reasonably segregated.
- **Per FOIA Improvement Act of 2016**, deliberative process privilege also now has a 25 year threshold rule:
 - “...the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested...”

DELIBERATIVE PROCESS PRIVILEGE

- **Facts**

- The privilege does not protect *purely* factual material except when:
 - The sorting and selection of pertinent facts itself reflects a deliberation—aka “deliberative facts.”
- Must be segregated unless they are inextricably intertwined with deliberative materials (recommendations, opinions, analysis, etc...)

DELIBERATIVE PROCESS PRIVILEGE

RECAP

- The privilege safeguards the process by which the government formulates policies and makes decisions
- Protects information that is both:
 - Predecisional
 - Deliberative
- **Per FOIA Improvement Act of 2016:**
 - Harm analysis now required for Exemption 5
 - Deliberative Process Privilege now has a 25 year threshold rule

DELIBERATIVE PROCESS PRIVILEGE

Common Scenarios

- Request and Approval Process
- Case Notes/Search Slips (FOIA)
- Investigative Reports
- Talking Points
- Q and As

DELIBERATIVE PROCESS PRIVILEGE

Discretionary Release

- Is it permitted?

b5

DELIBERATIVE PROCESS PRIVILEGE

Discretionary Release

- Deliberative materials may in some cases be appropriate for discretionary disclosure based on “foreseeable harm” analysis.
- Attorney-Client or Attorney Work Product are generally not appropriate for discretionary disclosure

ATTORNEY WORK PRODUCT PRIVILEGE

- Purpose:
 - Protect the adversarial process by creating a zone of privacy for an attorney to prepare his/her case for trial
- Covers materials compiled or prepared by – or for – an attorney in reasonable anticipation of litigation

ATTORNEY WORK PRODUCT PRIVILEGE

- Two requirements:
 - (1) Materials were prepared by an attorney or by an employee (*e.g.*, paralegal; LSU GIS) at the direction of an attorney
 - (2) Materials were prepared in anticipation of litigation

ATTORNEY WORK PRODUCT PRIVILEGE

- Litigation includes:
 - Civil litigation
 - Criminal prosecutions/matters
 - Administrative proceedings
 - Appeals
- Litigation must be “anticipated” but does not have to actually occur
 - For example, U.S. Attorney’s Office declines prosecution

ATTORNEY WORK PRODUCT PRIVILEGE

- Protects both facts and legal analysis
 - No need to segregate and release facts
- Protects final agency decisions
 - For example, memoranda deciding or declining to prosecute
- Protects materials even after all litigation is completed

Once Work Product, Always Work Product

ATTORNEY WORK PRODUCT PRIVILEGE

RECAP

- Provides protective zone for attorneys to prepare cases for litigation
- Litigation does not have to actually occur
- Privilege continues after all litigation ends
- Both facts and analysis are protected

ATTORNEY-CLIENT PRIVILEGE

- Purpose:
 - Encourage clients to make full and frank disclosures to their attorneys, so that attorneys can provide candid legal advice and effective representation
- Protects all confidential communications between an attorney and his/her client for the purpose of obtaining legal advice or assistance

ATTORNEY-CLIENT PRIVILEGE

- Four requirements:

- (1) A client
- (2) Communicates confidential information
- (3) To an attorney
- (4) For the purpose of obtaining legal advice or assistance

ATTORNEY-CLIENT PRIVILEGE

- Client

- The FBI and its employees can be “clients” for purposes of the privilege

- Attorney

- FBI OGC attorneys
- CDCs/ADCs
- DOJ Counsel (AUSAs, CRM or CIV Division, NSD, ...)
- Attorneys must be acting in their capacity as attorneys with respect to the communication

ATTORNEY-CLIENT PRIVILEGE

- Protects:
 - Confidential information (facts) provided by the client to the attorney
 - Opinions/advice provided by the attorney based on and reflecting the confidential information provided by the client
 - Communications between attorneys that reflect client-supplied confidential information
 - ✦ For example, two OGC attorneys conferring about how to advise the client

ATTORNEY-CLIENT PRIVILEGE

- Not limited to litigation
- Confidential information and the attorney's advice remains privileged unless/until the client chooses to divulge it

ATTORNEY-CLIENT PRIVILEGE

RECAP

- Protects facts (confidential information provided by a client) and legal opinions
- FBI and its employees are “clients”
- FBI and DOJ attorneys are “attorneys”
- Not limited to litigation
- Communications are privileged unless/until disclosed by the client

QUESTIONS?



LITIGATION SUPPORT UNIT

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PRACTICAL EXERCISE

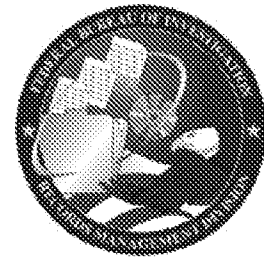
E-MAIL STRING



LITIGATION SUPPORT UNIT

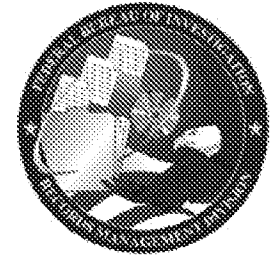
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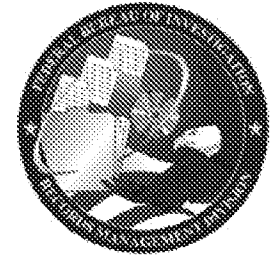


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FOIA Litigation 101

Litigation Support Unit (LSU)



Where can a case be filed?

- ▶ A FOIA (civil) lawsuit requires both proper Jurisdiction and Venue.



"Jurisdiction"

The authority of a court to hear and decide cases.



"Venue"

The particular geographical area in which a court with jurisdiction may hear and decide cases.



Where can a case be filed?



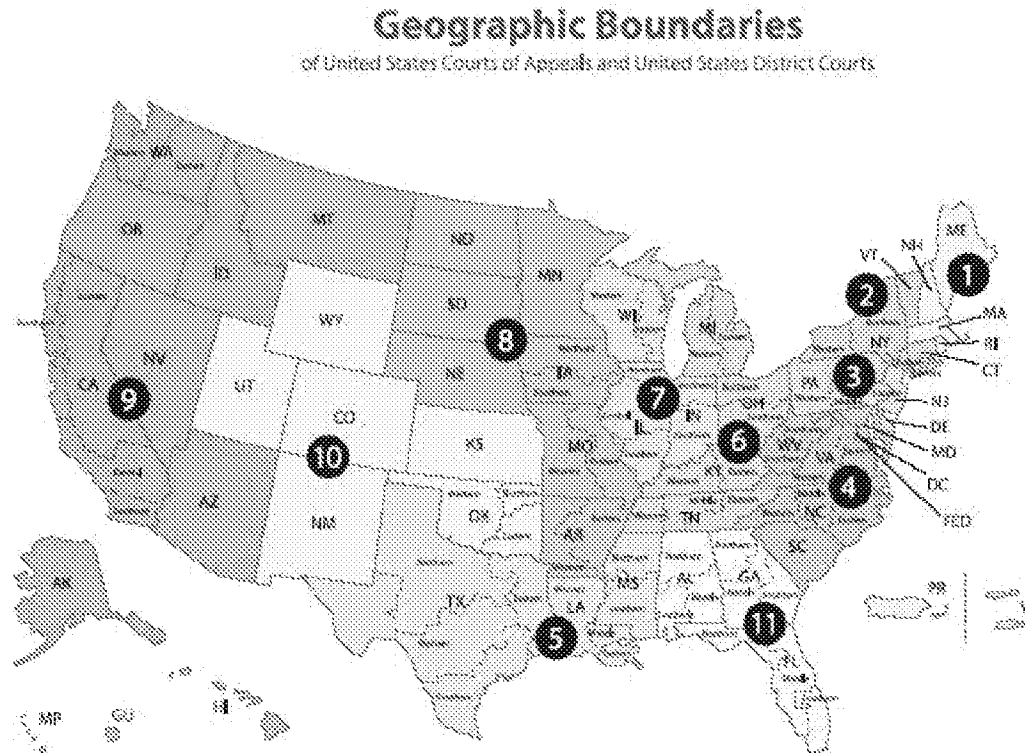
▶ Jurisdiction

- FOIA case must be brought in a U.S. District Court.
[5 USC § 552 (a)(4)(B)]
- Plaintiff must allege that agency: (i) “improperly,” (ii) “withheld,” (iii) “agency records.” [Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 150 (1980).]

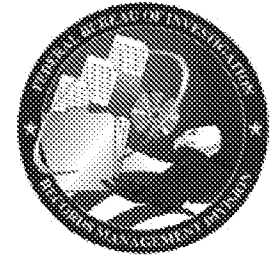
▶ Venue [5 USC § 552 (a)(4)(B)]

- Federal judicial district where:
 - Plaintiff resides,
 - Plaintiff has principal place of business,
 - District where the records are located, or
 - District of Columbia (*most cases are brought here*)

Where can a case be filed?



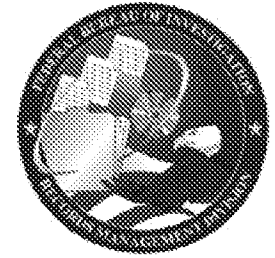
Federal FOIA cases are brought in the Federal trial court called the District Court; some states have more than one district - there are 94 districts



Where can a case be filed?

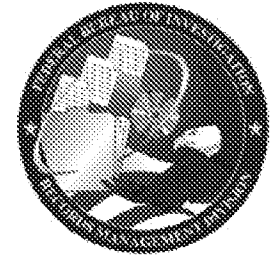
- ▶ Losing party in District Court can appeal to a U.S. Court of Appeals
- ▶ Court of Appeals
 - 13 of them
 - 11 numbered regional courts
 - Court of Appeals for the D.C. Circuit (*hears appeals from D.C. District Court)
 - Court of Appeals for the Federal Circuit
- ▶ **U.S. Supreme Court**
 - Losing party on appeal petitions and is granted a writ of certiorari (rare) to have the appellate decision reviewed.

When can a case be filed?



- ▶ Statute of Limitations: 6 years for a FOIA claim to be filed from the date of the final response.
- ▶ Exhaustion of Administrative Remedies:
 - Exhaustion of administrative remedies is required before a party can seek judicial review.
- ▶ Types of Exhaustion:
- ▶ Actual:
 - Before filing suit, a requester must appeal his/her request via the administrative appeals process with DOJ OIP, unless constructive exhaustion applies.

When can a case be filed?



► Exhaustion of Administrative Remedies, continued:

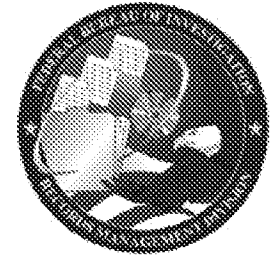
- **Constructive Exhaustion [5 USC § 552 (a)(6)(C)]:**
- A person making a request shall be deemed to have exhausted the administrative remedies if the agency fails to comply with the statutory time limit to respond.
 - FOIA provides the agency 20 working days to make a “determination” in response to a request. [5 USC § 552 (a)(6)(A)]
 - FOIA provides the agency 30 working days, if unusual circumstances exist, to make a “determination in response to a request.”
 - If admin appealed, the FOIA provides OIP 20 working days to make an appeal determination.
- Acknowledgement letter ≠ a determination.

When can a case be filed?



- Ogelsby doctrine: After constructive exhaustion would apply, the requester must still complete the administrative appeals process if an agency determination is made and received by the requestor after 20 working days.
- Requester must also file admin appeal within time frame required by the agency or will also fail to exhaust. [Oglesby v. Dep't of the Army, 920 F.2d 57 (D.C. Cir. 1990).]
- Admin appeal must be received by OIP within 90 calendar days from date of RIDS letter. [28 CFR 16.9].

What is the litigation process?



- ▶ **Filing a FOIA Suit:**
 - Complaint filed in U.S. District Court with Clerk.
 - Clerk issues a Summons.
 - Complaint and summons is served on the U.S. Attorney's Office (USAO) in district where filed.
 - Note that Federal Rules of Civil Procedure have other service requirements, but service on the USAO is mandatory and will generally start a case.
 - LSU is notified of suits via several methods; most are provided by OGC.

- ▶ DOJ is the proper party defendant as suit under the FOIA is brought against the responsible federal "agency," not agency components.

What is the litigation process?



▶ Litigation Process Steps

- Complaint filed and served on defendant with summons.
- Answer by defendants.
 - **30** days from receipt of proper service of Complaint.
 - Responds to the allegations in the Complaint by either–
 - Denying/admitting in whole or part;
 - Lack of sufficient information to respond, and/or;
 - Requires a legal conclusion to which no response is required.

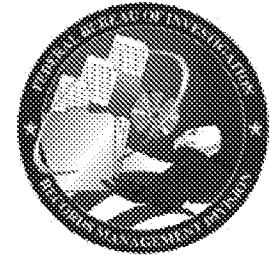
What is the litigation process?



▶ Litigation Process Steps

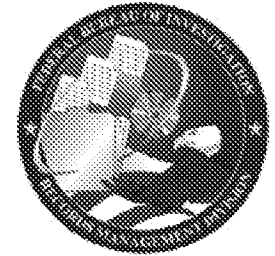
- Plaintiff's Opposition to Motion or Cross Motion
 - Per schedule or local court rules.
 - Typically due from opposing party **14** days from service of MSJ or cross motion.
- Defendants Reply to Opposition or Cross Motion
 - Per schedule or local court rules by moving party.
 - Typically due from the moving party **7** days from service of opposition to motion.
- Court Rules—Grant/Deny in full or in part

What is the standard of review?



- ▶ FOIA cases are reviewed “*de novo*.” 5 USC § 552(4)(B).
 - The District Court examines the case “anew” to determine if the agency can be legally withhold information under a FOIA Exemption.
 - Court may order production of documents for review *in camera*.
 - Government (defendant) has the burden to show that material is exempt from release.

Why are suits filed?



- ▶ Why the requesters seeks the information is generally not relevant to the withholding of substantive information, but may be relevant to determination of:
 - Expedited processing—the FBI has 10 working days to respond to expedite request
 - Fee waiver/fee status
- ▶ Common plaintiffs include:
 - Pro se prisoners seeking records about their criminal cases
 - Public interest/advocacy organizations.
 - Historical researchers

FBI FOIA Litigation Concepts?



- ▶ Key threshold issues—Get it right at the start!
 - Fees.
 - Statutory requirement as implemented by DOJ. 5 USC 552(a)(4)(A); 28 CFR 16.11.
 - If not waived, failure to pay or commit to pay applicable fees is grounds for dismissal.
 - Setting the tone.
 - The “Kick-off” meeting and distro of LSU action plan.
 - Communication—you are the link between counsel and the rest of RIDS.

Questions ?

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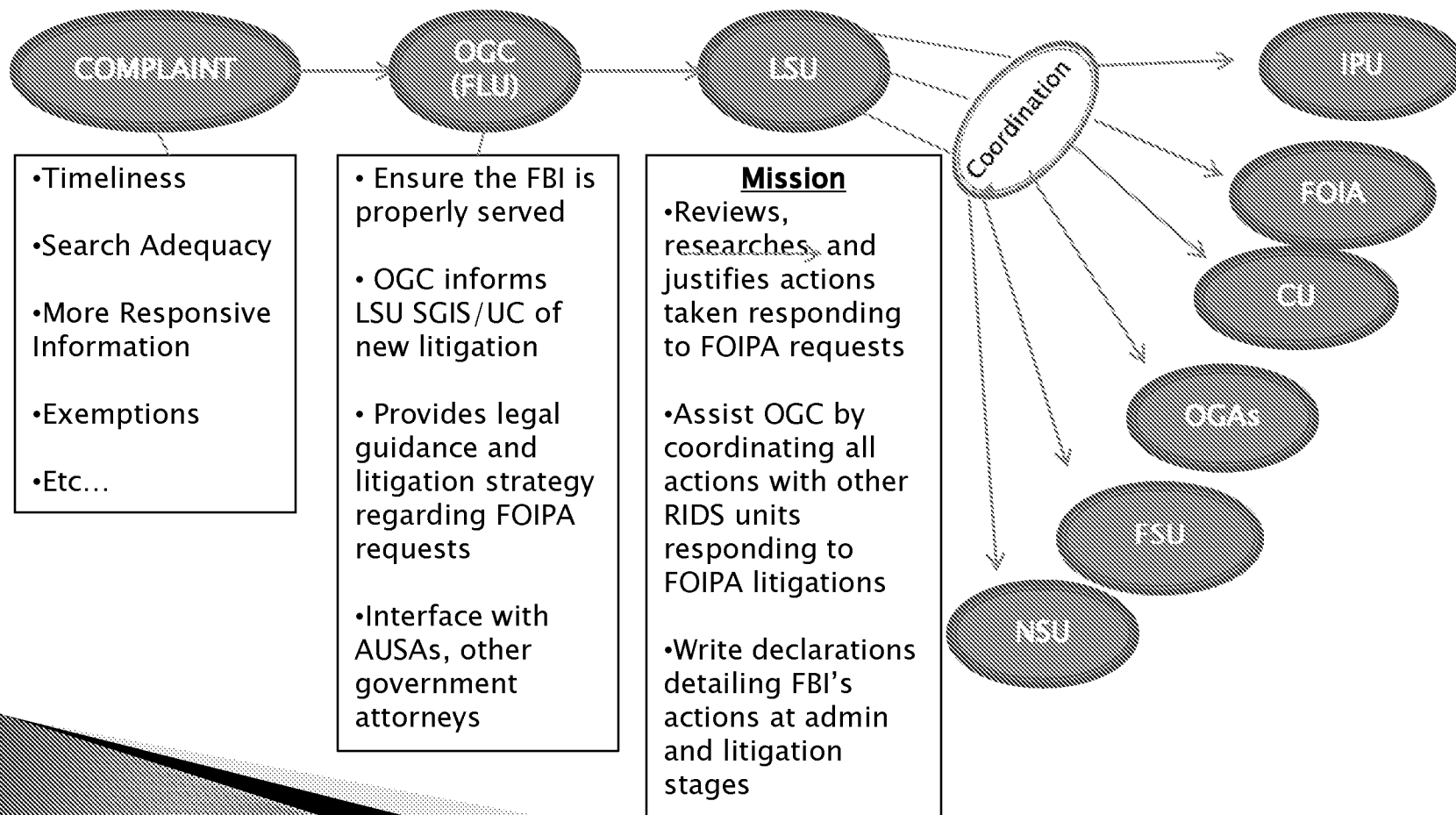
Introduction to LSU & The Basics

Why is it important to get it right?

- Litigation and the De novo review – At the litigation stage, this is the last opportunity for the FBI to correct any issues that may have been overlooked at the admin stage (e.g. search, processing, response). If we do not correct the issue in the litigation we have waived the opportunity.
- It is essential that the FBI is factual in its responses. If something was overlooked at the admin stage with a different outcome in the litigation stage, we must address and explain it at this stage.

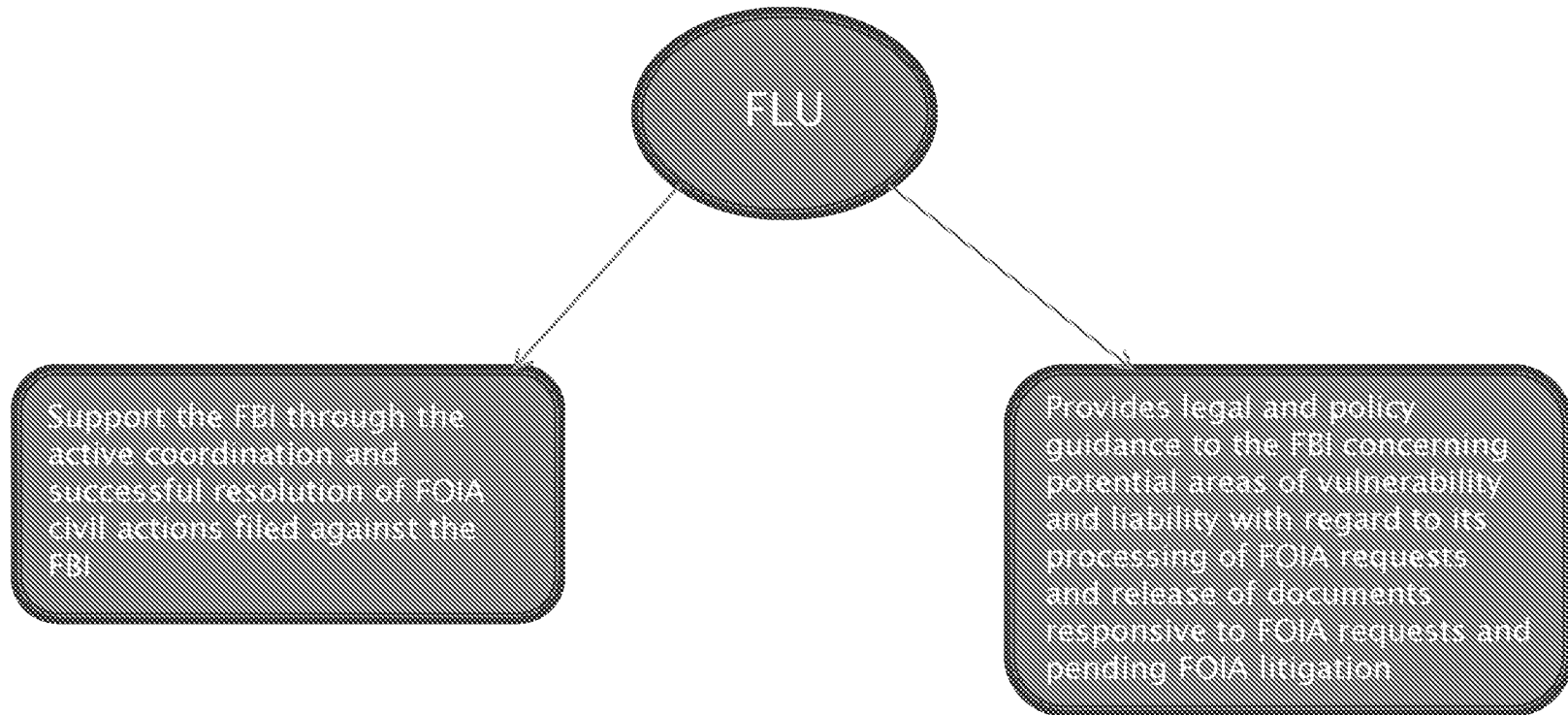
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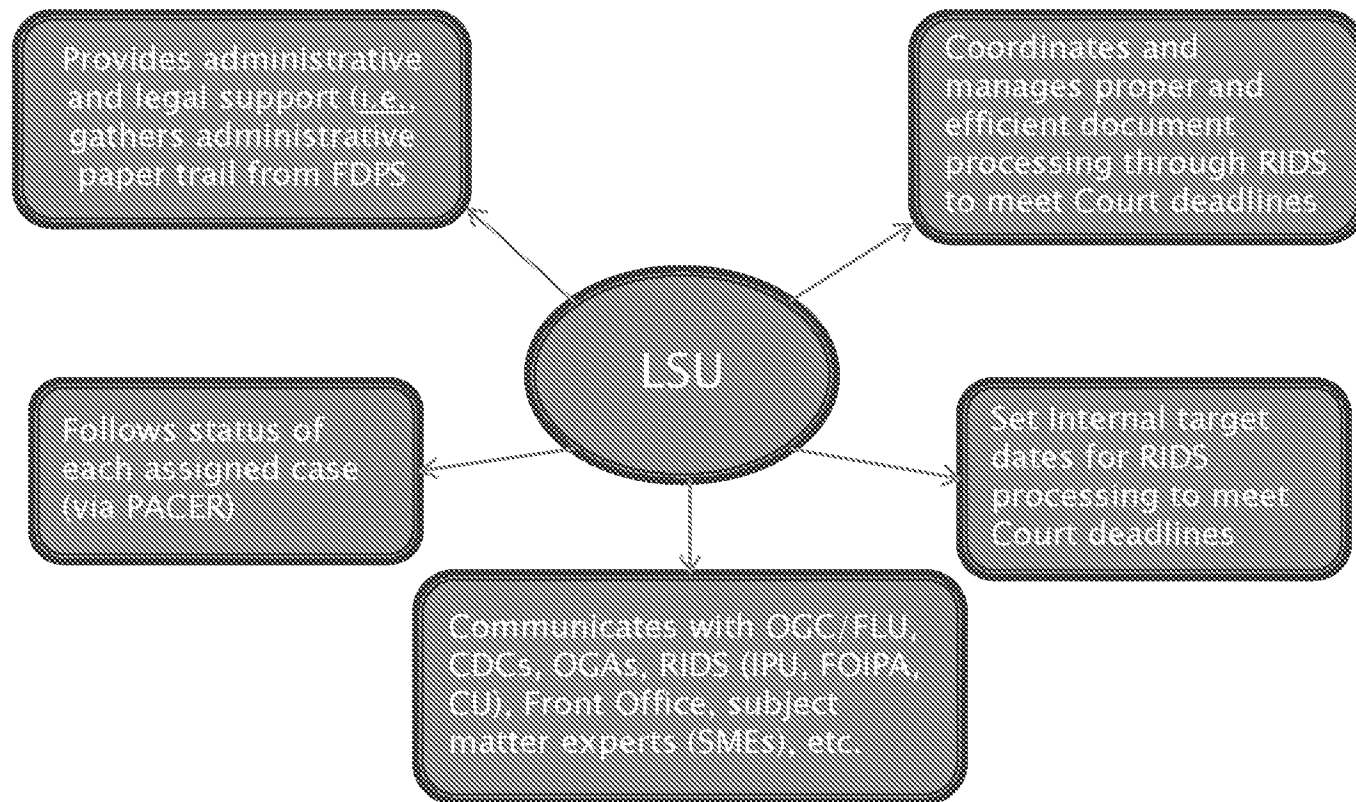


FLU Key Responsibilities

- FLU was established in March 2003

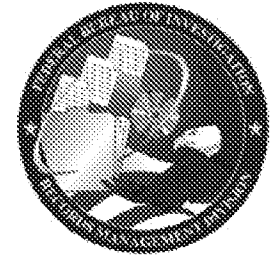


LSU – Key Responsibilities





Crassus Cutis
Frigus Sanguis



LSU's Tool Kit

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Public Access to Court Electronic Records (“PACER”)

- ▶ PACER allows online access to U.S. District Court, U.S. Bankruptcy Court, and U.S. Courts of Appeals case information.
- ▶ 2001 PACER became available via Web. If you need court information prior to 2001, you may need to contact the court directly.
- ▶ www.PACER.gov [need login and password]
- ▶ *See PACER User Manual*